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Appealing Arbitration Awards: Why the Courts' Role is Limited



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When parties arbitrate a dispute, as opposed to pursuing litigation in the Courts, there is an understanding that the arbitration should bring the matter to an end. A recent decision of the Supreme Court of Canada, *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, reaffirms the very limited circumstances in which Courts will entertain an appeal from an arbitral award.

The *Teal* decision limits the Courts' appellate jurisdiction. Moreover, where that narrow jurisdiction exists, *Teal* emphasizes that the appellate Court should show the arbitrator deference.

Teal involved a claim for compensation by a forestry company which possessed licenses to harvest Crown timber in British Columbia. The province reduced, amongst other things, the company's access to roads and bridges which the company relied on to harvest the timber. Accordingly, the company claimed compensation for this reduction and the claim was sent to compulsory arbitration under the British Columbia *Forestry Revitalization Act*.

The arbitrator who heard the dispute had many issues to resolve. For the most part, the forestry company won the dispute.

First, there was an issue of statutory interpretation. The arbitrator had to decide on a valuation method that was consistent with the compensation provisions under the *Forestry Revitalization Act* (the "Statutory Interpretation Issue"). Ultimately, the arbitrator selected a "depreciation replacement costs method" as the proper methodology for awarding compensation.

Second, the arbitrator had to rule on a question of contractual interpretation. The issue on appeal was whether the arbitrator let the factual matrix, i.e. the circumstances surrounding the making of an amended settlement agreement between the parties, overwhelm the words of the agreement when he interpreted it. At issue was whether the arbitrator allocated too much weight to his consideration of the factual matrix and whether the arbitrator's interpretation was isolated from the words of the contract (the "Contractual Interpretation Issues").

Third, there was an issue of “statutory application”. The question was whether the arbitrator erred in denying compensation to the forestry company with regard to improvements associated with one of its licenses because the company never “lost access to those improvements, in contrast with other licences where the company did lose access”. This issue, according to the Supreme Court of Canada, involved “the application of a specific valuation methodology to the intricate facts before the arbitrator” (the “Statutory Application Issue”).

Under the British Columbia *Arbitration Act*, R.S.B.C. 1996, c.55, a Court hearing an appeal from an arbitral award is limited to hearing “questions of law” only. As the Supreme Court of Canada held in *Teal*, “statutory limitations on the scope of appellate review of arbitration awards are ‘absolute’”, meaning that if any of the above issues is not a question of law, the Courts have no jurisdiction to consider them on appeal.

What is a “Question of Law”?

Given the limited appellate jurisdiction of the Court under the British Columbia *Arbitration Act*, the Court had to decide which of the issues above amounted to “questions of law”.

The Court classified three types of “questions” that are possible on appeal—legal, factual or mixed.

A legal question is a question “about what the correct legal test is”. Factual questions are questions about “what

actually took place between the parties”.

Mixed questions of fact and law are questions about “whether the facts satisfy the legal tests”. In other words, mixed questions “involved applying a legal standard to a set of facts”. However, with respect to mixed questions, where a court applies a legal test to a set of facts and the legal test may have been altered by the Court, then a pure question of law arises. For instance, where a party alleges that an arbitrator failed to consider a required element of a legal test, the arbitrator “deleted” an element of the legal test and therefore altered it. This amounts to a “legal question” or “question of law”.

When considering the three classifications of “questions” available on appeal, the Court should be reluctant to identify “extricable questions of law” from mixed questions in order to gain jurisdiction on appeal.

In other words, Courts should be hesitant to identify pure questions of law in an arbitral decision as this would undermine the policy goal of limited appellate intervention in arbitral awards:

...A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable

question of law...), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

In *Teal*, the Statutory Interpretation Issue, i.e. which methods of valuation were acceptable under the *Forestry Revitalization Act*, was a “matter of statutory interpretation” and therefore a question of law, amenable to appellate review by the Courts.

With respect to the Contractual Interpretation issues, the issue of whether the arbitrator gave excessive weight to the factual matrix when interpreting a settlement between the parties was a question of mixed fact and law that fell outside the Court’s appellate jurisdiction. The arbitrator was required to weigh the factual matrix with the words of the settlement contract.

However, the issue of whether the arbitrator’s interpretation of the factual matrix was isolated from the words of the contract raised a question of law, but the matter was not reviewable on appeal because the argument lacked merit, i.e. the Court held that the arbitrator’s interpretation of the factual matrix “was clearly anchored in the words of the contract”.

As for the Statutory Application Issue, i.e. whether the arbitrator erred in denying compensation to the forestry company relating to the improvements associated with one its licences because it never lost access to those improvements, this question

involved the application of a valuation method to the facts before the arbitrator. This was a mixed question beyond the scope of appellate review.

On the basis of these classifications, the Court held that the only reviewable issue on appeal was the Statutory Interpretation Issue as a pure question of law.

Deference to the Arbitrator's Ruling

The Court began its analysis of the Statutory Interpretation Issue by holding that the standard of review of an award under the *Arbitration Act* is "almost always" the deferential standard of reasonableness.

Citing its previous decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court noted that deference to a commercial arbitration award was consistent with the two policy goals of efficiency and finality in commercial arbitration.

That is, in commercial arbitration, where appeals are limited to questions of law, the standard of review will be reasonableness "unless the question is one that would attract [the less deferential standard of correctness]". In *Sattva*, the Court identified the "rare circumstances" in which the correctness standard of review would apply to an arbitral award, i.e. where there is a constitutional question or a

question of law "of central importance to the legal system as a whole and outside the adjudicator's expertise".

Moreover, the Court noted that the nature of the question, i.e. legal, factual or mixed, was not dispositive of the standard of review. The Court held:

...it would be an error to claim that all statutory interpretation by an arbitrator demands correctness review simply because it engages a legal question. While statutory interpretation is a legal question...the mere presence of a legal question does not, on its own, preclude the application of a reasonableness review in a commercial arbitration context...

In *Teal*, none of the rare circumstances which would attract the correctness standard of review applied.

The Statutory Interpretation Issue was subject to reasonableness review. This deferential standard of review was supported by the fact that the parties had selected the arbitrator to adjudicate the issue of determining the appropriate valuation method. That is, the parties "had complete control over the choice of their arbitrator" and the arbitrator considered the very issue he was meant to address.

The Limited Role of Courts in Arbitral Appeals

By restricting the jurisdiction of the appellate Court in the way it classifies "questions of law" and by reaffirming that reasonableness is "almost always" the standard of review applicable to arbitral awards, the Supreme Court of Canada in *Teal* has carved out a narrow role for appellate Courts in reviewing an arbitrator's decision.

The primary policy goals of arbitration, namely efficiency and finality, are paramount. Whether the parties have chosen to arbitrate, or are required to do by statute, appellate Courts have a limited role in subjecting the arbitral award to further scrutiny. While *Teal* does not eliminate appellate review of arbitration, it signals an overall reluctance to question the decision of an arbitrator absent a pure legal error.